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ENTERTAINMENT AND SPORTS LAW

GORDON I. KIRKE, Q.C.

VOLUME I: SPORTS LAW

2002

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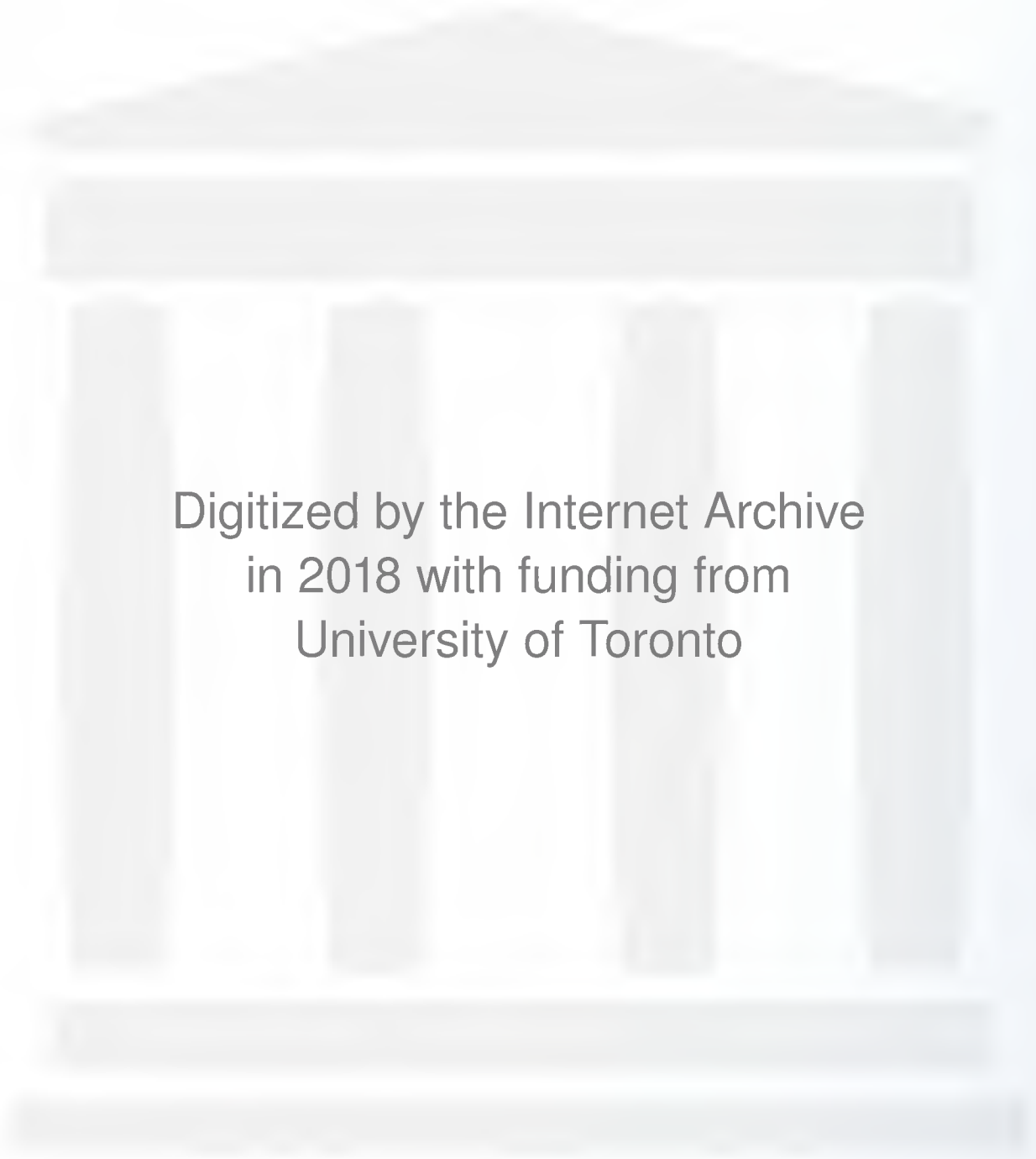
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Gordon I. Kirke, Q.C.

July, 2002

INDEX TO SPORTS LAW MATERIALS

PAGE

1. Standard Player Contract and Collective Agreements

A.	<u>Introductory Notes</u>	1-1
B.	<u>Standard Player Contracts</u>	
	(i) Baseball: The American League	1-3
	(ii) National Hockey League	1-9
	(iii) Canadian Football League	1-20
C.	<u>Collective Bargaining Agreements</u>	
	(i) National Hockey League - Excerpts	1-29
	(ii) Canadian Football League - Collective Agreement - Excerpts	1-65
	(iii) Brown v. Pro Football Inc.	1-77
	(iv) The American League and The National League of Professional Baseball Clubs and The Toronto Blue Jays Baseball Club	1-79
D.	<u>Incentive Clauses</u>	
	(i) National Football League	1-84
E.	<u>Assignment of Contracts</u>	
	(i) Washington Capitols Basketball Club Inc. v. Barry	1-89
	(ii) Notes	1-95
F.	<u>Termination of Contracts</u>	
	(i) Termination by Club: Neilson v. Vancouver Hockey Club	1-96

INDEX TO SPORTS LAW MATERIALS

PAGE

1. Standard Player Contract and Collective Agreements

A.	<u>Introductory Notes</u>	1-1
B.	<u>Standard Player Contracts</u>	
	(i) Baseball: The American League	1-3
	(ii) National Hockey League	1-9
	(iii) Canadian Football League	1-20
C.	<u>Collective Bargaining Agreements</u>	
	(i) National Hockey League - Excerpts	1-29
	(ii) Canadian Football League - Collective Agreement - Excerpts	1-65
	(iii) Brown v. Pro Football Inc.	1-77
	(iv) The American League and The National League of Professional Baseball Clubs and The Toronto Blue Jays Baseball Club	1-79
D.	<u>Incentive Clauses</u>	
	(i) National Football League	1-84
E.	<u>Assignment of Contracts</u>	
	(i) Washington Capitols Basketball Club Inc. v. Barry	1-89
	(ii) Notes	1-95
F.	<u>Termination of Contracts</u>	
	(i) Termination by Club: Neilson v. Vancouver Hockey Club	1-96

PAGE

- (ii) Termination by Player: Alabama Football Inc.
v. Greenwood 1-108

G. Entitlement in Event of Injury

- (i) Excerpts from a Summary of Termination due
to Injury Arbitrations 1-117
- (ii) Robitaille v. Vancouver Hockey Club 1-124

H. Avoidance Due to Age

- (i) Toronto Marlboro Major Junior “A” Hockey
Club et al 1-139

2. Arbitration

A. Collective Bargaining Agreements - Arbitration

- (i) National Hockey League 2-1
- (ii) Canadian Football League 2-16

B. Article: “A Survey of Grievance Arbitration Cases
in Major League Baseball: 2-24

C. Article: “The Role of Salary Arbitration in Baseball” 2-45

D. Sprewell v. Golden State Warriors 2-51

E. Notes 2-65

3. Immoral Conduct in Sports

A. Drug Use

- (i) Introductory Notes 3-1
- (ii) NBA Anti-Drug Program 3-3
- (iii) Major League Baseball Drug Policy &

	<u>PAGE</u>
Prevention Program	3-24
(iv) National Football League Policy & Program for Substance of Abuse	3-30
(v) Article: “Totally Juiced”	3-32
(vi) Notes on Baseball Arbitration Ruling on Drug testing clauses	3-42
(vii) Baltimore Orioles Voluntary Drug Testing Program	3-45
(viii) Notes on National Football League - Arbitration Rulings on Drug Tests	3-53
(ix) Note on Drug Testing in Canadian Amateur Sports	3-59
(x) Article: “Hill vs. NCAA: Drug Testing Goes to the State Supreme Court”	3-62
(xi) Canadian Policy on Penalties for Doping in Sport	3-66
(xii) Revised January 2000 - Canadian Policy on Doping in Sport Highlights	3-73
(xiii) Article: “Law and Athlete Drug Testing in Canada”	3-75
 B. <u>Gambling</u>	
(i) Excerpt from the NBPA Constitution	3-116
(ii) Molinas v. National Basketball Assoc.	3-117
(iii) Settlement Agreement and Stipulation of Dismissal for Pete Rose	3-120

PAGE

C. **General**

- | | | |
|-------|--|-------|
| (i) | Articles on the history of misconduct in sports | 3-123 |
| (ii) | Student Subjected to Hostility Files Lawsuit Over Hazing | 3-125 |
| (iii) | Harassment and Abuse in Sports - Excerpts from "Players First": A Report for the Canadian Hockey League by Gordon I. Kirke, Q.C. | 3-128 |
| (iv) | Sexual Harassment: Female Athletes' Experiences and Coaches' Responsibilities | 3-137 |
| (v) | PGA v. Martin | 3-142 |
| (vi) | Notes on Discrimination | 3-146 |

4. **Discipline and Judicial Review**

- | | | |
|-------|---|------|
| (i) | Article: "Sporting Decisions: Should the Courts Participate?" | 4-1 |
| (ii) | Article: "Reynolds v. International Amateur Athletic Federation: The Need For an Independent Tribunal in International Athletic Disputes" | 4-3 |
| (iii) | Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc. | 4-24 |
| (iv) | Gretzky v. Ontario Minor Hockey Association et al | 4-34 |
| (v) | Article: "Wrestler Lindland gets to Sydney via Supreme Court" | 4-37 |
| (vi) | Cases and Notes | 4-40 |

5. **Violence in Sports**

- | | | |
|-----|-------------------------|-----|
| (i) | The Queen v. Ciccarelli | 5-1 |
|-----|-------------------------|-----|

	<u>PAGE</u>
(ii) Article: “Tough Sentence Warning to Player”	5-19
(iii) R. v . McSorley	5-20
(iv) Article: “Hockey hackers not above the law”	5-23
(v) Notes	5-25
6. <u>Inducing Breach of Contract</u>	
(i) Greig v. World Series Cricket	6-1
(ii) Article: “Russians Take Offensive in War of Words with NHL”	6-23
(iii) Potechin v. Yashin et al	6-25
7. <u>Remedies for Breach of Contract</u>	
(i) Warner Brothers Pictures, Inc. v. Nelson	7-1
(ii) Winnipeg Rugby Football Club v. Freeman	7-5
(iii) The Dan Ainge Contract	7-8
(iv) Detroit Football Company v. Dublinski (OHC)	7-15
(v) Detroit Football Company v. Dublinski (OCA)	7-29
(vi) Note	7-35
(vii) Article: “The Greatest Baseball Player to Be Sued for Breach of Contract”	7-36
8. <u>Restraint of Trade</u>	
A. <u>Common Law</u>	
(i) Nagle v. Feilden	8-1
(ii) Greig v. World Series Cricket	8-5

	<u>PAGE</u>
(iii) Article: “Restraint of Trade: Breathing New Life into an Old Legal Doctrine	8-15
(iv) Note	8-19
B. <u>International</u>	
(i) Union Royale Belge des Societes de Football Association et al v. Jean Marc Bosman	8-20
C. <u>Anti-Trust Issues and Collective Bargaining</u>	
(i) Competition Act [updated]	8-47
(ii) Flood v. Kuhn	8-48
(iii) Notes and Cases	8-64
(iv) Article: “Partial Repeal of Major League Baseball’s Antitrust Exemption is Enacted”	8-65
D. <u>Canadian Junior Hockey</u>	
(i) Hebert v. Shawinigan	8-69
(ii) Greenlaw v. Ontario Major Junior Hockey League	8-72
(iii) Notes and Cases	8-74
E. <u>Limits on the Granting and Movement of Franchises</u>	
(i) Introductory Notes	8-75
(ii) Levin v. National Basketball Assoc.	8-76
(iii) Los Angeles Memorial Coliseum Commission v. National Football League v. Oakland Raiders	8-79

	<u>PAGE</u>
(iv) City of Oakland v. Oakland Raiders	8-97
(v) Edmonton Northlands v. Edmonton Oilers	8-101
(vi) Article: “Oilers Garner Enough Resources to Survive”	8-119
(vii) Article: “Unilateral Contraction by MLB Owners is Protected by MLB’s Long Standing Antitrust Exemption - Not Any More”	8-120
(viii) Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership	8-128
 9. <u>The Player’s Agent</u>	
(i) Introductory Notes	9-1
(ii) Warren v. Mendy	9-6
(iii) Article: “The Need to Regulate Sports Agents”	9-8
(iv) Article: “Judge Doty Holds NFL Player Agents are Subject to the Collective Bargaining Agreement”	9-32
(v) The Standard Representation Agreement between NFLPA Contract Advisors and Players	9-34
(vi) Article: “Uniform Athlete’s Agents Act Passes	9-36
(vii) Athlete Agent Legislation and Regulations Update	9-40
(viii) Uniform Athletes Agents Act	9-46
(ix) Article: “The Sports Attorney as Business Manager”	9-73
(x) Article: “How to Get Them to Show You the Money”	9-76

1. STANDARD PLAYER CONTRACT AND COLLECTIVE AGREEMENTS

A. *Introductory Notes*

Introduction

The employer-employee relationship in professional sports is highly regulated and relatively few aspects of the relationship are subject to individual amendment or negotiation. Player contracts are standard forms which regulate most of the basic terms of the player's employment. The League By-Laws regulate, amongst other things, the allocation, registration, and movement of players. Finally, the Collective Agreements lay down common minimum standards of employment, benefits, and grievance procedures. The only items left open to individual negotiation are the length of service and the quantum and form of remuneration. In situations where a Standard Player Contract is modified, the League's Collective Agreement mandates that the changes can only be to the benefit of the player.

Standard Player Contract

The contents of the Standard Player Contract were originally devised unilaterally by team management. The contracts granted sweeping powers to the club and imposed detailed obligations on the player. These contracts were offered to the player on a "take-it-or-leave-it" basis. This inequality in bargaining power, however, has been remedied to some extent with the development of collective bargaining in professional sports. The Collective Agreements of the various Leagues protect the players interests by prescribing the Standard Player Contract and the amendments that would be acceptable. In the event of conflict between the Collective Agreement and any other contract (Standard Player Contract or League By-Laws), the Collective Agreement will govern.

Standard Player Contracts in professional sports, at present, impose three major obligations on the players: (1) to play for and train with the club; (2) to maintain good physical condition; and (3) to abide by the rules of the League and the Club. The Club is obliged, in return, to pay the player's salary. Standard Player Contracts generally contain a "Unique Skill Provision" in which the player expressly acknowledges having a unique skill or ability, the loss of which cannot be adequately compensated for by damages. These clauses also stipulate that the Club reserves the right to enjoin the player from performing that skill for any other person or club during the term of the contract (C.F.L.- Section 13; N.F.L. - Section 3; Baseball - Section 4).

These Standard Player Contracts also give the Club a "Power of Assignment" which allows the Club to trade or sell players by assigning their contracts to other teams in return for money or the assignment of another player's contract (C.F.L. - Section 13; N.F.L. - Section 17; Baseball - Section 6). Athletes with

special bargaining power may be able to amend this provision by replacing it with a “No-Trade” clause so that the Club is precluded from assigning the player’s contract without the player’s consent. Alternatively, under a limited trade clause the Club may only be precluded from assigning the player’s contract to specific teams with the player’s consent.

A number of the Standard Player Contracts also contain option clauses which give the Club the right to extend the term of service, usually with the same obligations as in the last year of the original contract (C.F.L. - Section 3; Baseball - Section 10). Finally, these contracts often contain clauses which hold the Club liable for the player’s salary in the event of injury provided that the injury was sustained as a result of the player’s service to the Club and was not a general want of fitness.

There are some terms of the Standard Player Contracts that are open to individual negotiation. The most common areas of negotiation include the length of the contract, the base salary and form of payment, performance incentives and bonuses, payment of expense to players, and whether the contract is to be wholly or partially “guaranteed” by the Club.

Collective Agreements

Under collective bargaining, the Players’ Association bargains on behalf of all players on all teams throughout the League and deals with representatives of all teams. Professional athletes differ from many other “unionized” employees in that they are a small, relatively elite group of “entertainers”, ranging from fringe players to superstars, with short careers and a high turnover rate. There is no attempt made to standardize or equalize pay as Collective Agreements set only the minimum level of salaries. Specific salary negotiations, as previously discussed, are left to individual negotiation. The Collective Agreements are primarily concerned with the general working conditions, grievance arbitration, and disciplinary action. Dispute resolution and arbitration procedures are designed to provide fair, expedient, and orderly procedures to resolve player-club conflicts. Discipline clauses set out a general principal that the player must obey the reasonable rules of the Club, and further state that the Club cannot discipline a player without just cause.

E. (ii)

NOTES

SEE ALSO:

1. *Munchak v. Cunningham*, 457 F.2d 721 (1972). [negotiating post-option period]
2. *Sheehy v. Edmonton World Hockey Enterprises Ltd.* (1980), 105 D.L.R. (3d) 644 (Alta. Q.B.). [effect of assignment on contract]

2. E.

NOTES

SEE ALSO:

1. *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041 (1990). [enforcement of arbitrator's order]
2. *Major League Baseball Players Association v. Garvey*, 121 S. Ct. 1724 (2001). [judicial deference to labour arbitrators]

3. A. (i)

IMMORAL CONDUCT IN SPORTS**A. DRUG USE***Introductory Notes*

There have been a number of well publicized cases over the years, involving baseball, hockey, and basketball players, which have focused the attention of the public, sporting bodies, and athletes on the issues of drug use and drug prevention.

The drugs most commonly involved fall within two broad categories: (i) performance enhancing drugs such as cocaine, amphetamines, and anabolic steroids; and (ii) recreational drugs such as marijuana, heroin, and LSD.

The increased use of drugs in professional sports has been attributed to a number of causes including: higher player salaries, increased media and public pressure on players, and the general increase in the use of drugs in society as a whole.

Drug use has raised a number of grave concerns from the perspective of the clubs and professional sporting bodies that include:

- (a) the athlete's health (several star athletes have died in recent years from drug overdoses);
- (b) the effect of drug use on the "image" of a professional league or a particular team; and
- (c) the potential involvement of organized crime.

The response of clubs and professional sports governing bodies has varied. The initial reaction of clubs and sporting bodies was generally focused on detection and punishment of drug users. League presidents, in the purported exercise of disciplinary powers given to them to protect the "integrity of the sport", began to impose heavy fines, lengthy suspensions, and, on occasion, lifetime bans. In addition, clubs and professional sports leagues began to clamour for the imposition of mandatory drug testing. The notion of imposing mandatory drug tests has led to protracted disputes and negotiations with the players' unions. The players, while generally supportive of the need to rid professional sports of drug use, have raised a number of concerns with mandatory drug testing that include:

- (a) the invasion of personal privacy of the athlete;
- (b) the confidentiality of drug test results;
- (c) the confidentiality of the athlete's private medical history; and

(d) the need to stress education and treatment rather than punishment.

The following section sets out a summary of some arbitration decisions dealing with the attempts of various sporting leagues to deal with issues imposed by drug testing. Unilateral imposition of drug testing has generally been found to contravene provisions of the various collective agreements.

As a result of the players' concerns, the emphasis has now shifted somewhat to *counselling* players on the dangers of drug use and to the provision of drug rehabilitation services by both teams and leagues. The National Basketball Association, for instance, has established a program whereby a player may voluntarily submit to drug rehabilitation while still collecting full pay. If, however, the player uses the rehabilitation program a second time, the player is suspended without pay during treatment. A third visit to the rehabilitation program may result in the player being banned from basketball. In addition, if the player is found guilty of using or distributing heroin or cocaine, the player faces an immediate lifetime ban.

It is interesting to note that professional sports bodies are concerned almost exclusively with recreational drugs such as marijuana. Performance enhancing drugs such as anabolic steroids are largely ignored. For example, the Baltimore Orioles Drug Abuse Program is aimed solely at the detection of cocaine and marijuana. Conversely, drug testing in amateur sports is aimed primarily at performance enhancing drugs.

4. (vi)

NOTES

SEE:

1. *Lecuyer v. Alberta Junior "A" Hockey League* (1977), 3 A.R. 213 (S.C.).

In this case, a junior "A" hockey player was suspended for one year for "spearing" another player. The Alberta Supreme Court refused to grant the player an injunction which would have prevented league officials from enforcing the suspension. The Court held that an injunction is an equitable remedy and generally is "available only to persons who themselves have behaved equitably."

2. *Willey v. McLaughlin et al.* (1976), 49 C.P.R. (2d) 86 (B.C.S.C.).

In this case, a professional golfer accused the defendants of "conspiracy to injure him" by suspending him from the CPGA, and other related activities. The Court granted the plaintiff an interlocutory injunction restoring him to the CPGA, and restraining any other disruptive actions of the defendants. In reaching this decision, the Court questioned the legality of various CPGA by-laws, and noted that the suspension had a very detrimental effect on the golfer's ability to earn a livelihood.

SEE ALSO:

1. *Ali v. State Athletic Comm.*, 316 F.Supp. 1246 (1970). [abuse of discretion in denial of boxer's license]
2. *Blalock v. LPGA*, 359 F.Supp. 1260 (1973). [suspension imposed by committee of competitors; illegal exclusion]
3. *Kane v. Canadian Ladies' Golf Association*, [1992] P.E.I.J. No. 110 (S.C.-Trial Div.). [team selections declared null and void]
4. *Kinnear v. Piper et al.* (1978), 1 A.C.W.S. 573 (Ont. H.C.J.). [explanation about expulsion required because of by-law]
5. *Omaha et al. v. British Columbia Broomball Society* (1981), 13 A.C.W.S. 373 (B.C.S.C.). [no power to suspend]

5. (v)

NOTES

SEE ALSO:

1. *R. v. Kemp*, [1993] S.J. No. 62 (Q.B.). [no intent to hit spectator]
2. *R. v. Leclerc* (1991), 4 O.R. (3d) 788 (C.A.). [consent to assaults inherent and reasonably incidental to the normal playing of hockey]
3. *R. v. McSorley*, [2000] B.C.J. No. 1993 (Prov. Ct.). [entire decision; description of unacceptable conduct during game of hockey]

A. (iv)

NOTE

SEE ALSO:

1. *Eastham v. Newcastle United Football Club*, [1964] 1 Ch. 413. ["retain and transfer" system declared restraint of trade]

C. (iii)

NOTES**SEE ALSO:**

1. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002), aff'g 97 F.Supp.2d 130 (D. Mass. 2000). [Court of Appeals rejected antitrust challenge to M.L.S. citing broad geographic market and lack of prior competition; no mention of "single entity" argument accepted at District Court]
2. *Linesman v. World Hockey Assn.*, 439 F.Supp. 1315 (1977). [age restriction found to be unjustifiable boycott contrary to antitrust law]
3. *Mackey v. N.F.L.*, 543 F.2d 606 (1976), aff'g 407 F.Supp. 100 (1975);. ["Rozelle Rule" (N.F.L. compensation system) found unreasonable violation of antitrust]
4. *McCourt v. California Sports Inc.*, 600 F.2d 1193 (1979); rev'g 460 F.Supp. 904 (1978). [antitrust challenge to N.H.L compensation system rejected because of labour exemption]
5. *N.B.A. v. Williams*, 45 F.3d 684 (2nd Cir. 1995). [antitrust law does not apply to collective bargaining even after labour agreement expires]
6. *Radovich v. N.F.L.*, 352 U.S. 445 (1957). [football not covered by baseball's antitrust exemption]
7. *Smith v. Pro Football Inc.*, 593 F.2d 1173(1978), aff'g 420 F.Supp. 738 (1976). [imposed draft was unreasonable restraint of trade violating antitrust law]

D. (iii)

NOTES

SEE ALSO:

1. *Boduch v. Harper* (1974), 64 D.L.R. (3d) 463 (Ont. H.C.J.). [injunction striking down “residence and release” system rejected]
2. *Sheddon v. O.M.J.H.L.* (1978), 19 O.R. (2d) 1. [injunction may be given to prevent irreparable loss of professional opportunities]

E. Limits on the Granting, Contracting and Moving of Franchises

(i) *Introductory Notes*

The major thrust of these materials has been the relationship between players and clubs in professional sports. The following section provides some insight into the limitations on the ownership and movement of professional sports franchises. The cases reproduced in this section raise, in particular, the following issues:

1. The ability of existing league members to determine the suitability of a prospective owner where a transfer of ownership of a franchise is contemplated;
2. the ability of existing league members to control the creation of new franchises in the league;
3. the ability of existing league members to control the movement of a team from one location to another;
4. the ability of a city or municipality to prevent the movement of a sports franchise to another location; and
5. the ability of existing league members to unilaterally contract a franchise.

In the Canadian context, the first three issues noted above may be effected by Section 48 of the *Competition Act*, which is set out earlier in these materials.

It is also interesting to note that, in addition to the issues raised in this section, the courts have also dealt with such matters as the ability of a league to prevent members from acquiring ownership interests in other sports leagues. See, for example, *N.A.S.L. v. N.F.L.*, 670 F.2d 1249 (1982).

9.

THE PLAYER'S AGENT*(i) Introductory Notes*Background

Until a couple of decades ago, most players negotiated their own contracts with their respective teams. Since that time, however, the involvement of professional player agents has grown steadily to the point where it is now quite rare for a player to negotiate a contract directly with the club. The growth in the use of player agents can be attributed primarily to the enormous increase in player salaries. With the larger financial stakes, players have turned to professional agents in an effort to obtain favourable contracts and to advise them with respect to their legal rights, financial management, and tax planning. Although there are many factors which have contributed to the escalation in salaries, the major factors are: elimination of reserve clauses; the creation of competing leagues; the development of free agency; mandatory salary arbitration; the development of collective bargaining; and increased media exposure and revenue from radio, network television, cable television, and pay-per-view.

Role of Agents

An agent is someone who is given authority to transact business on behalf of another. The contract between the player and his agent establishes the nature and extent of the agent's authority to act on behalf of the athlete. It is advisable that the player/agent agreement be in writing, and the athlete should obtain independent legal advice before entering into an agreement with an agent.

The role of the agent will, of course, vary depending on the agreement with the athlete. In certain instances, the agent's role may be limited simply to negotiating the initial contract.

In other instances, the agreement may be much broader and may include complete financial management services. The following is a list of services commonly provided by a player agent:

1. Negotiating the terms of the original contract. Many aspects of the Standard Player Contract are not negotiable. Substantial latitude, however, still exists for individual negotiation. The agent will negotiate: the length of the contract; whether the contract is to be guaranteed by the club; signing bonuses; base salary and the form of payment of the base salary, (i.e. salary deferral; performance incentives; and payment of

expenses to players such as travelling expenses, moving expenses, and meal allowances.

2. Protecting the interests of the player during the term of the contract. This may include such matters as renegotiating a contract during its term, trades, handling of salary and/or grievance arbitrations, or resolving disputes with the club.
3. Counselling the client. Because of the relative lack of sophistication of many young athletes, an agent will provide counselling regarding such matters as legal rights, tax planning, and investment advice.
4. Financial management services. In many instances the agent, or the agent's management company, will administer the player's financial planning. For example, it is not uncommon for an agent to arrange for a player's salary to be paid directly to the agent, with the agent paying the player an allowance and investing the balance.
5. Marketing. This is an area where a skilful agent can significantly increase the player's income by arranging such ventures as product endorsements and personal appearances. The agent must be aware of the applicable terms of the Standard Player Contract and Collective Agreements which may have a bearing on marketing opportunities. The agent will also attempt to ensure that there is no unauthorized use of the player's image or name for commercial purposes.
6. Preparing the player for his life after his playing career is over. This may include matters such as financial and tax planning as well as helping the player obtain some other form of employment after retiring from professional sport.

Compensation

The form of the agent's compensation will vary depending on the contract with the player. Compensation can be based on an hourly rate, a flat rate, a percentage of the player's income, or a combination of the three. Most agents, generally speaking, work on a percentage basis. This is typically 3% to 10% of the player's "compensation". The definition of the player's "compensation" becomes very important in determining the agent's compensation. "Compensation" may include signing bonuses, incentive payments, and income from endorsements and personal appearances.

Another very important factor regarding the agent's compensation is the timing of payments to the agent. It must be established whether the agent will receive remuneration upon execution of the Standard Player Contract, or whether the remuneration will be deferred over a longer period. The interests of the player and the agent, in this regard, can often diverge as the agent will want to receive

compensation at the earliest possible date. In many instances, the signing bonus negotiated by the agent for the player becomes the agent's compensation for negotiating the contract.

In 1982, the National Football League imposed certain maximum compensation rules for N.F.L. player agents. The agent is limited to 10% of the player's compensation in the first year of the player's contract *in excess* of the minimum salary stipulated by the N.F.L. collective agreement. In the second year of the player's contract, the agent is limited to 5% of the compensation received by the player in excess of the minimum league salary. In the third year, this figure declines to 2% of compensation received in excess of the stipulated minimum salaries. These percentages can be increased, however, if the agent manages to negotiate *guaranteed* contracts, where the agent has negotiated "exceptional" contract terms, or if the agent has spent an exceptional amount of time in negotiations *and* the player agrees to the increased fee. It should also be noted that the N.F.L. collective agreement defines "compensation", for the purposes of calculating the agent's remuneration, to *include* the base salary and signing bonuses attributable to the base years of the contract, but *exclude* matters such as incentive bonuses, collectively bargained benefits, or benefits automatically provided by the Standard Player Contract.

Selecting an Agent

The player must consider the competence and experience of the agent as well as matters of personal compatibility. The player must also consider whether to hire a lawyer as an agent. While many agents are non-lawyers, the advantages to a player of using a lawyer as an agent include: lawyers are bound by legal and ethical codes of conduct, lawyers can advise as to many legal issues that may arise, and lawyers have expertise in negotiating and drafting contracts.

Ethical Issues

In recent years, there has been much discussion of the ethical issues involved in the player/agent relationship. Many of these ethical concerns relate to conflicts of interest between the player and his agent. An example of such a conflict arises when an agent also happens to act for the Players' Association. Another area of conflict which is fairly common arises where an agent represents several players on the same team. The agent may be attempting to negotiate contracts on behalf of two players who are competing for the same position on the same team. Other areas of

conflict involve financial matters where the interests of the player and the agent diverge. As noted above, a player may seek to have salary deferred over a long period of time, whereas the agent may prefer to see that salary paid immediately in order to receive compensation at an earlier date. In addition, an agent will have an interest in ensuring that a young player commences a playing career at a young age, whereas the player may have an interest in furthering educational goals. Other major ethical areas of concern include the solicitation of potential clients by agents, and the handling of the client's funds and property.

Regulation of Professional Sports Agents

The ethical problems referred to above, plus concerns over the competence of agents, have prompted some developments in the regulation of professional sports agents.

If an agent is also a lawyer then the agent will be bound by the ethical codes of conduct in force in that particular jurisdiction and by normal duties of care imposed on lawyers. Therefore, the major concern in terms of regulation involves agents who are not lawyers.

There have been several attempts in the United States to regulate professional sports agents. In the following section, a list of states that have passed agent regulation is provided. In addition to statutes in various U.S. jurisdictions, certain non-statutory regulatory schemes have been developed. For example, in 1982, the National Football League established a scheme for the certification of N.F.L. player agents. Certification is a prerequisite for negotiating N.F.L. player contracts, and such certification may be denied for a variety of grounds including previous misconduct by the agent and any other conduct effecting the agent's integrity or competence. In addition, N.F.L. rules contain disciplinary provisions for agents who fail to comply with the certification scheme. Other matters covered by the N.F.L. Agreement include limits on the solicitation of players by agents and the imposition of ethical rules of conduct on agents.

The Association of Representatives of Professional Athletes (ARPA), which is a voluntary association, has established a code of ethics dealing with the conduct of its members. It should be noted that agents acting on behalf of major league baseball players must obtain a signed authorization from a player before they may negotiate with the club on behalf of a player.

Recently, the National Conference of Commissioners on Uniform State Laws, with the endorsement of the N.C.A.A., developed the Uniform Athlete Agents' Act. This legislation,

reproduced in the pages that follow, is already implemented in many states and requires all sport agents to register with a specific state agency in order to obtain a license to conduct business. This recent attempt will probably prove to be more successful at regulating professional sports agents in the United States as the act establishes a uniform set of rules regulating athletes' agents and holds them accountable for their actions.

